(Submitted with the Consent of the Parties)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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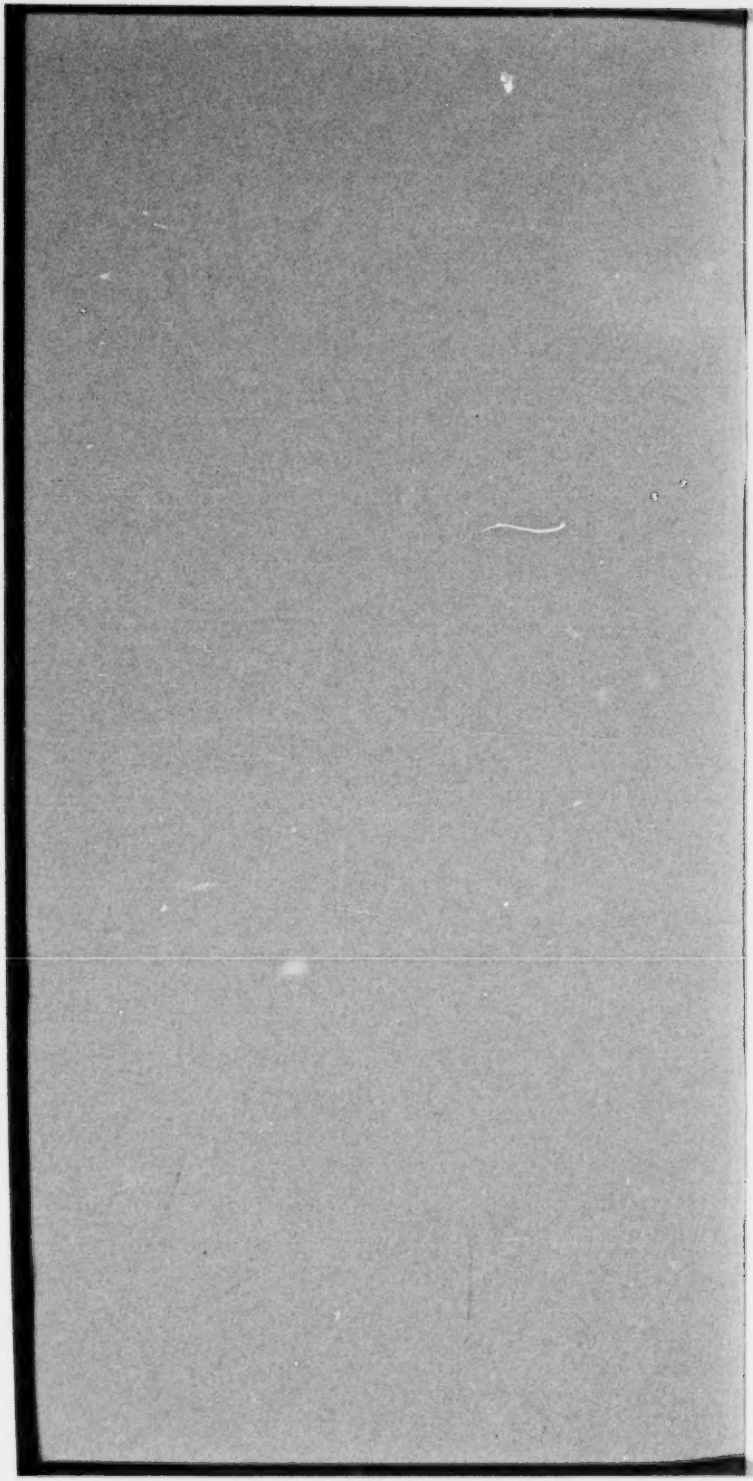

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Interest of The Authors League

The Authors League is a national society of professional writers and dramatists; one of its principal purposes is to express their views on fundamental issues of copyright law. The League files this brief (with the parties' consent) because the Court of Claims decision raises questions of enormous importance and grave concern to professional authors.

Preliminary Statement

The majority opinion (487 F.2d 1345) held that the "wholesale, machine copying and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies "is—'fair use' ". Consequently, the Court denied the plaintiff reasonable compensation for the reprints of its copyrighted articles produced by the libraries. The quoted description of the libraries' activities is Chief Judge Cowen's (487 F.2d 1364); but it accurately delineates the large reprint publishing operation conducted by the government's libraries at substantial cost to the public. "Business-as-usual" payments are made to the Xerox corporation (ironically in the form of per-page "royalties") and to the suppliers of other equipment and materials, and normal compensation is paid to library employees for their services in operating and supervising this wholesale, reproduction service. Judge Cowen's description also fits the "one-at-a-time" reprint publishing operations conducted by other library networks, and by commercial firms, including the highly successful Xerox subsidiary, University Microfilms.

Summary of Argument

The majority opinion made drastic changes in copyright law which must be reviewed by this Court:

1. The opinion radically altered the doctrine of fair use, with serious consequences to authors in many copyright areas.

2. The opinion rejected the explicit request by Congress that the courts decide infringement—fair use

issues in this area on a case-by-case basis, applying established principles of fair use. Instead it gave a draconian answer, apparently based on the premise that Congress would have to legislate a more "reasonable" solution.

3. The opinion cast grave doubts on the scope of the professional author's fundamental right to reproduce copies of his books, articles, stories, plays and poems, intimating that non-profit and commercial reproduction services can now produce and distribute "single copies" of his works without compensating him.

POINT I

The Serious Questions Created by the Majority Opinion Should be Reviewed by this Court.

All the opinions below emphasize the importance of resolving the issues which this Court is asked to review. For the majority, Judge Davis said the suit was a "groundbreaking copyright infringement action" which presented "troublesome problems, which have been much discussed" but never before "determined by a court." (487 F.2d 1346) Chief Judge Cowen, dissenting, stressed the "difficult and perplexing issues presented by this case." (487 F.2d 1363). And Judge Nichols, dissenting, said "However hedged, the decision will be read that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law." (487 F. 2d 1366)

Unless the serious questions raised by these opinions are resolved now by this Court, authors, publishers, library networks and other users of copyrighted works will be put

to large expense in litigation and appeals, as trial courts grope to apply the radically altered principles of the majority opinion. The long-awaited Copyright Revision Bill, whose enactment is by no means assured, would not resolve these issues. Indeed its pertinent provisions were drawn on the premise that this Court would do so.

POINT II

The Majority Opinion Radically Altered the Doctrine of Fair Use.

As Judge Cowen and Trial Judge Davis demonstrated, the four established criteria of fair use do not support the majority's conclusion. However, it made far-reaching changes in the doctrine. For example, although the libraries engaged in the wholesale production* of "exact duplicates of (and substitutes for) the original articles", the majority refused to apply the cases and authorities which held that "wholesale copying . . . without more, defeats the defense of fair use." (487 F.2d 1366)

Moreover, the majority rejected the most important criterion—the effect of the wholesale, systematic production of copies on the "potential market" for the plaintiff's articles; i.e., the inhibitive effect, in the future, on the sale of additional subscriptions and the sale of "single-copy"

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* "Single copy" is a euphemism. The libraries produce a copy of an article to fill each request. If one hundred individuals order a copy of the same article, the library produces 100 "single copies", one-at-a-time, to fill each order. Under the majority's opinion, the libraries could make 10, 100, 1000 or more copies of the same article in this manner without compensating the plaintiff.

reprints by plaintiff's licensed reproduction service. The primary importance of "future market" effect as a fair use criterion under the decisional law is emphasized by the House Judiciary Committee discussion of the doctrine in its Report on the 1967 Copyright Revision Bill: "Isolated instances of infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." (p. 35, House Report No. 83, 90th Cong., 1st Session). For that very reason this Court has stressed that damages are awarded to discourage future incursions, even though the infringement at issue—standing alone—is "uninjurious and unprofitable." *F. W. Woolworth & Co.* v. *Contemporary Arts., Inc.*, 344 U.S. 228, 233.

The government libraries' wholesale reproduction of copies has the inherent and inevitable effect of "aggregating" a vast number of individual infringements. Moreover, this systematic one-at-a-time reproduction of articles is designed to free the libraries it serves from purchasing subscriptions to periodicals which contain articles desired by their patrons. The wholesale, systematic library production of single-copy reprints is becoming, in itself, a separate medium for disseminating articles. And it only requires one or two subscriptions to periodicals, by a few library reproduction centers. As the opinions of Judge Cowen and Trial Judge Davis establish, the record amply supports the Trial Judge's findings of both actual damages and potential injury to the plaintiff. It is imperative that this Court review the several changes in the doctrine of fair use wrought by the majority opinion.

One of these is the majority's expansion of the doctrine to implement its socio-economic judgment that not one cent

of the substantial public funds given for library reproduction activities should go to compensate plaintiff for the reprints of its articles. As Judge Cowen indicated, this judgment contradicts the "economic philosophy" underlying the copyright clause of the Constitution. (487 F. 2d 1372) Ostensibly, the majority contended that medical science would be injured if library reproduction of articles was "stopped." But as Judges Cowen and Nichols made clear, the "stopping" of copying was a spurious issue. The Court of Claims could not enjoin the defendant's libraries from continuing to reproduce copies of plaintiff's articles. And all plaintiff sought was reasonable compensation, to be set by the Court. Such payments would not have "stopped" library copying. The libraries' reproduction services operated despite vastly greater payments to the Xerox Corporation, other suppliers and library employees—all for the purpose of producing reprints of plaintiff's articles and other copyrighted works. The Xerox Corporation, for example, received a specified fee for each page of each copy of plaintiff's articles produced by the government libraries. But unless the plaintiff had selected the articles from a mass of manuscripts, edited them, set them in type, printed them, bound them and distributed them—the Xerox machines could only have churned out blank pages.

POINT III

This Court Should Determine Whether the Judiciary Should Resolve Fair Use Issues Without Gratituitously Assuming that Congress Will or Must Legislate Statutory Solutions.

The majority opinion's predominant theme is the "need for Congressional treatment of the problems of photocopying." (487 F.2d 1363) It reflects the opinion's uneasiness at refusing to apply the established principles of fair use, and the resulting inequity inflicted on the plaintiff. And it invites, even implores, Congress to legislate a solution more reasonable than the majority's draconian decision; indeed, the opinion seems premised on the assumption that Congress will do so.

However, Congress has spoken on this point. In its report on the 1967 Copyright Revision Bill, the House Judiciary Committee flatly rejected the suggestion of a library copying exemption, such as the Court of Claims has "legislated"; and the Committee also rejected any other legislative solution. (p.36, House Report No. 83; 90th Congress, 1st Session). In complete contradiction to the majority opinion, the Judiciary Committee said:

> "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the *courts* must be free to adapt the doctrine to particular situations on a case-by-case basis." (p. 32) (emphasis added)
>
> * * *
>
> ". . . the Committee does not favor a specific [legislative] provision dealing with library photocopying.

> Unauthorized library photocopying, like everything else must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." (p. 36).

Had the four majority judges reached the same conclusion as the three dissenting judges and the trial judge, the plaintiff would have received reasonable compensation; and the libraries would continue their systematic, wholesale reproduction of its articles. Furthermore, with their respective interests protected, both sides probably would have followed the course prescribed by the House Judiciary Committee—to voluntarily establish "reasonable arrangements . . . providing workable clearance and licensing conditions . . ." (p. 36)

POINT IV

The Serious Doubt Cast on the Fundamental Right of Authors and Publishers Must be Resolved.

To buttress its conclusion of fair use, the majority contends that the verb "copy" in Section 1(a) of the Copyright Act* may not include the production of "single copies" of books, periodicals, monographs, plays and sheet music as distinguished from paintings, photographs, maps and other graphic works. Obviously, the Xerox machine itself cannot be the basis for the distinction. At one touch of the button it can produce anywhere from 1 copy to 999 copies. And like a letter press, offset press or other reproducing device, it reproduces pages containing the text as originally set by

* Granting the copyright owner "the exclusive right (a) to print reprint, publish, copy and vend the copyrighted work."

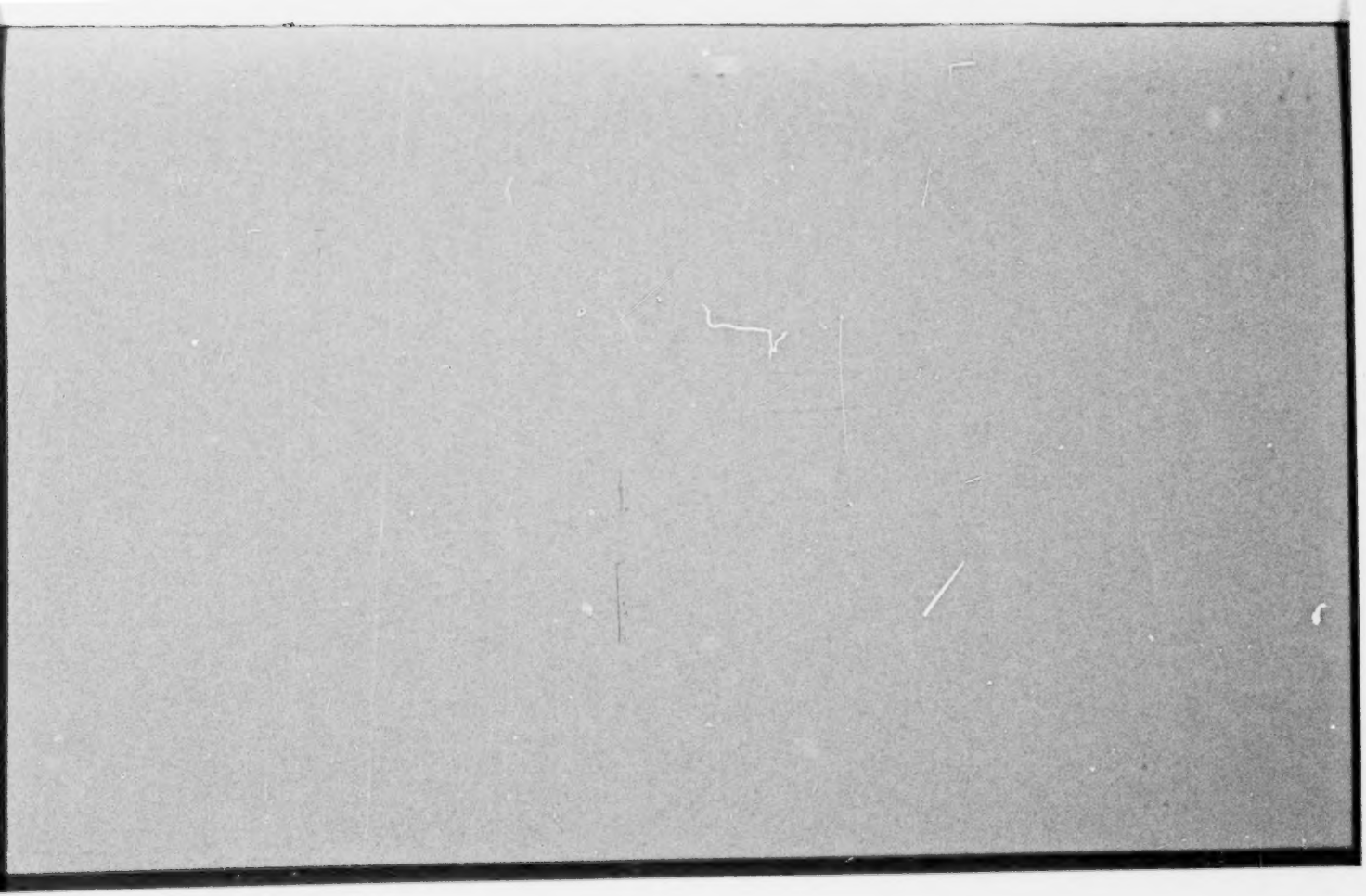
any one of a variety of typesetting machines. What the majority suggests is that when the Xerox machine—or for that matter a letter press or other device—reproduces only one copy of a copyrighted work at a time, that reproduction may not violate the copyright owner's rights under the present law.

The opinions of Judge Cowen and Trial Judge Davis discuss the cases and authorities which completely refute the majority's theory. But the serious doubts it may create must be resolved by this Court to prevent widespread injury to authors and publishers. Commercial reproduction services now produce and distribute "single copies" of copyrighted books, periodicals, articles, and other writings, using the same Xerox proces employed by defendant's libraries, under license from the copyright owner. According to the theory suggested by the majority, vast duplication of copyrighted works could be carried on by commercial and non-profit reproduction centers—creating an accumulation of single copies of the same work, made at different times —without the copyright owner's permission and without compensating him.

The Authors League respectfully submits that the plaintiff and concerned *amici curiae* are entitled to a review of the Court of Claims decision, so that they may demonstrate the fallacy of its disastrous theory.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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